

Predictability

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Business Perspective

- Microsoft: Considerable experience under Section 2
 - Product design, packaging, pricing, licensing
- Predictability of utmost concern
 - Firms really want to know the rules of the road
 - Yet application of law increasingly difficult to predict
 - Consequences to business and consumers greater than ever
- Rule of Reason
 - Hard to apply when experts fundamentally disagree as to whether particular effects are procompetitive or anticompetitive
 - Windows integration examples

Predictability

Various Factors Combine to Make Predictions Increasingly Uncertain

New Business Models

- Development of compatible “ecosystems”
- Very low marginal cost products or services
- Complex relationships among firms

New Technologies

- IP-based
- Increasing antitrust focus on product design
- Engineering trade-offs difficult to assess
- Time lag between design, assertion of antitrust claims

Predictability

Various Factors Combine to Make Predictions Increasingly Uncertain

Multiple Constituencies

- Rise of “multi-sided markets”
- Differing business interests (and thus varying potential antitrust claims) even of similarly-situated firms
- Web search example

Multiple Enforcers

- DOJ, FTC, States, competitors, consumers
- With globalization, increasing assertiveness and number of foreign agencies: EU, Asia
- Broad scope of prosecutorial discretion
- Interaction among enforcers

Stakes Higher than Ever

Product Design Timeline



Design decisions

- Often must be made years before product release
- Often difficult or impossible to "undo" later
- Relied upon by third parties, other parts of the product
- Windows 95 example

Stakes Higher than Ever

IP Licensing

- Decisions often irreversible: Once proprietary technology licensed, typically can't get it back
 - Trade secrets revealed
 - Firms rely upon licensed IP
- Global antitrust enforcement
 - Agency demand for licensing on a worldwide basis
 - Agency imposing greatest licensing obligations *de facto* determines rules (likely not to be U.S.)
- Risk that value of IP is diminished
 - Royalties not established by market forces

Consequences

Risk of overdeterrence arises from combo of

- Difficulty in predicting outcomes, changing course later
- Variety and number of possible claims
- Desire to avoid controversy

Consumer welfare effects

- Limitations on product improvement
 - Windows, Office examples
- Antitrust advice to (gulp) raise prices
 - Lower package prices would be efficient absent any effect on competitors (demand aggregation)
- Increased R&D costs
 - Slowed decision-making; use of senior exec time
 - Work with questionable commercial value

Suggestions

Clarity

- Stronger presumption that conduct widely practiced by firms with and w/o market power is efficient

Convergence

- Redoubled effort by U.S. agencies to evangelize U.S. approach
 - Provides greater predictability than other approaches

Comity

- Increasingly important to allocate responsibility among multiple agencies
- Greater deference to rules of defendant's home jurisdiction

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